No. 35071-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

TANA JO CHAVEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR ASOTIN COUNTY

APPELLANT'S OPENING BRIEF

Sean M. Downs
Attorney for Appellant

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

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A. ASSIGNMENTS OF ERROR

1. The charging document for Vehicular Homicide was constitutionally deficient.
2. There is insufficient evidence to support the finding of an aggravating circumstance of a particularly vulnerable victim.

B. STATEMENT OF THE CASE

Ms. Chavez was charged by an information filed on August 31, 2016 with one count of Vehicular Homicide by DUI from an incident alleged to have occurred on August 29, 2016 regarding alleged victim Charles Mingus. CP 1. The information alleged that "on or about the 29th day of August 2016, in Asotin County, Washington, the Defendant operated a motor vehicle while under the influence of alcohol or drugs, and this conduct was the proximate cause of injury which caused the death of Charles J. Mingus." CP 1. The information did not include language that injury was proximately caused by driving, nor did the information include language that death had to ensue within three years of injury, amongst other things. CP 1; *cf.* RCW 46.61.520. On December 14, 2016, the State filed notice of intent to seek an exceptional sentence above the standard sentencing range pursuant to RCW 9.94A.535(3)(b), based on the alleged particular vulnerability of the victim. CP 16.

Ms. Chavez agreed to waive her right to a jury trial and instead proceed with a stipulated facts trial. CP 17, 22. Ms. Chavez did not stipulate to facts regarding the aforementioned aggravator of particularly vulnerable victim. RP 27-29; CP 26. The parties then presented stipulated facts for the court to review at trial, which Ms. Chavez signed. CP 23-27. The court reviewed the stipulated facts, which stated the following, in summary. On August 29, 2016, Ms. Chavez was driving a pickup truck and turned left from an intersection when the traffic light for her lane was green. CP 24. Mr. Mingus, who was ninety years old, was operating a motorized wheelchair which was marked with an orange flag. CP 24. Mr. Mingus was crossing the marked crosswalk to the left of Ms. Chavez, which had a "walk" traffic signal. CP 24. Ms. Chavez's vehicle then collided with Mr. Mingus as she was making a left-hand turn. CP 24.

Law enforcement contacted Ms. Chavez and administered field sobriety tests, which Ms. Chavez failed. CP 24. Ms. Chavez admitted to drinking a pint or more of vodka and her speech was observed to be slurred. CP 24. An analysis of Ms. Chavez's blood was completed, indicating 0.27g/100mL of ethanol and 6.8 ng/mL of THC detected. CP 25. On August 30, 2016, Mr. Mingus passed away from the injuries that he sustained. CP 25. Based on the facts submitted, the trial court found Ms. Chavez guilty of Vehicular Homicide. RP 32-33.

The court then proceeded with a hearing regarding the particularly vulnerable victim aggravator. RP 33. In its opening statements, the State relied on *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986) in its argument that by Mr. Mingus simply being a pedestrian, he was particularly vulnerable. RP 33-34. The State also presumably relied on *State v. Thomas*, 57 Wn. App. 403, 788 P.2d 24 (1990) in its argument that Mr. Mingus "had no way to expect that he was going to be hit by a vehicle at that time". RP 34.

The State called Ken Woltering, son-in-law of Mr. Mingus to testify. RP 37. He testified that Mr. Mingus had macular degeneration and had impaired vision in both eyes, he required hearing aids, his left arm was only two-thirds the length of his other arm and lacked musculature, he had one knee replacement, he had COPD from being a lifelong smoker, and he had balance issues due to fluid on the brain. RP 37-40. Mr. Mingus rode a motorized scooter which had an orange flag on it. RP 44.

In closing arguments, the defense relied on *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006) in its argument that there is a three factor test required to justify an exceptional sentence for a particularly vulnerable victim: (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime. RP 48. Just because Mr.

Mingus was infirm, did not make him any more vulnerable than any other person might be in a crosswalk. RP 48. The defense also made the distinction that a crosswalk does not have the same expectation of safety as a person's private property, thereby distinguishing the instant case from *State v. Cardenas*, 129 Wn.2d 1, 10–12, 914 P.2d 57, 61–62 (1996) (while driving through residential area defendant lost control of vehicle, which went over retaining wall and struck victim in her own backyard). RP 49-50.

The court found that Mr. Mingus was particularly vulnerable in its oral ruling and subsequent findings of fact. RP 52-53; CP 104-105. Mr. Mingus was found to be particularly vulnerable based on the following: (a) he was an elderly man of ninety years old; (b) his eyesight and hearing were impaired; (c) his balance and reactions were impaired; (d) his mobility was limited and he had to move via scooter; (e) his scooter was red for safety purposes; (f) the scooter had an orange flag for safety purposes; (g) he had a path of travel to include marked crosswalks at intersections with traffic lights and curb cuts for safety purposes; and (h) he was crossing a city street in daylight hours in a marked crosswalk with a "Walk" light in his favor at the time he was struck. CP 104. Ms. Chavez had an offender score of zero at the time of sentencing, with a standard range sentence of 78 to 102 months. CP 107. The court imposed an

exceptional sentence of 120 months based on the "particularly vulnerable victim" aggravator. CP 109.

This appeal follows.

C. ARGUMENT

1. The charging document for Vehicular Homicide was constitutionally deficient.

All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991) (citing Const. art. 1, § 22 (amend. 10); U.S. Const. amend. VI; CrR 2.1(b)). The primary purpose of such a document is to supply the accused with notice of the charge that she must be prepared to meet, therefore all essential elements of an alleged crime must be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be properly prepared. *Kjorsvik*, 117 Wn.2d at 101-102.

This rule serves two fundamental purposes. First, it helps ensure that defendants can adequately prepare a defense. *Kjorsvik*, 117 Wn.2d at 101. Second, it protects the double jeopardy rights of defendants by allowing them to plead the first judgment as a bar to a future prosecution for the same offense. *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 552

(1989); *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965); *State v. Carey*, 4 Wn. 424, 432-33, 30 P. 729 (1892). Thus, to be constitutionally sufficient, a charging document must both fairly inform the defendant of the charge and enable the defendant be able to plead double jeopardy in a future prosecution. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007) (recounting rule and holding that rule was satisfied in both respects).

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). When hearing a challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the document, and analyzes whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document…" *Kjorsvik*, 117 Wn.2d at 105. If the necessary facts do not appear, prejudice is presumed and reversal is required. *State v. McCarty*, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000).

Vehicular Homicide occurs "[w]hen the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person,…if the driver was operating a motor vehicle…[w]hile under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502". RCW 46.61.520(1).

The violation of RCW 46.61.502 must be the proximate cause of the injury, which in turn must be a proximate cause of death. *State v. Tang*, 75 Wn. App. 473, 475, 878 P.2d 487 (1994) (the DUI prong includes the non-statutory element of a causal connection between the defendant's alcohol consumption and the victim's death); *see also State v. Sanchez*, 62 Wn. App. 329, 331, 814 P.2d 675 (1991).

The charging document in the instant case states the following in full:

> That on or about the 29th day of August 2016, in Asotin County, Washington, the Defendant operated a motor vehicle while under the influence of alcohol or drugs, and this conduct was the proximate cause of injury which caused the death of Charles J. Mingus.

CP 1. The defects in the charging document are numerous. The document does not indicate that death is required to occur within three years of injury. It does not indicate that death was a proximate cause of injury. It does not indicate that injury was a proximate cause of being under the influence of intoxicants. It does not indicate that injury was a proximate cause of driving a motor vehicle. Although the information uses the term "conduct", it does not specify what this conduct is and it is left impermissibly vague.

If this court determines that there is a deficiency in the charging document but there is a fair construction by which the elements are all

contained in the document, then this court can still dismiss the conviction if the appellant can show that she lacked the requisite notice to prepare an adequate defense. *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). Appellant insists that there are too many defects in the charging document to find a fair construction.

Given the above, the charging document in the instant case was deficient. The remedy for such an error is reversal of the conviction and dismissal of the charge without prejudice. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

2. There is insufficient evidence to support the finding of an aggravating circumstance of a particularly vulnerable victim.

A trial court may impose a sentence outside the standard sentence range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Facts supporting aggravated sentences shall be determined pursuant to the provisions of RCW 9.94A.537. *Id*. There is an exclusive list of factors that can support a sentence above the standard range as determined by the procedures set forth in RCW 9.94A.537. RCW 9.94A.535(3). One of these factors is that the "defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance". RCW 9.94A.535(3)(b). This aggravating circumstance is

required to be proven beyond a reasonable doubt. RCW 9.94A.537(3). Before the court imposes an exceptional sentence, the court must also find that "there are substantial and compelling reasons justifying an exceptional sentence". RCW 9.94A.535; *State v. Pappas*, 176 Wn.2d 188, 192, 289 P.3d 634 (2012); *State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010). "Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law". *Id.*; *see also Suleiman*, 158 Wn.2d at 288.

Ultimately, "[i]n order for the victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *Suleiman*, 158 Wn.2d at 291-292.

When reviewing an exceptional sentence, the reviewing court must first determine whether the trial court's reasons are supported by the record. *State v. McAlpin*, 108 Wn.2d 458, 462, 740 P.2d 824 (1987); *Nordby*, 106 Wn.2d at 517. Because this is a factual question, the sentencing judge's reasons will be upheld if they are not "clearly erroneous." *McAlpin*, 108 Wn.2d at 462; *Nordby*, 106 Wn.2d at 517-18. A finding of fact is clearly erroneous only if no substantial evidence supports

it. *State v. Morris*, 87 Wn. App. 654, 659, 943 P.2d 329 (1997). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Second, the reviewing court must independently determine whether, as a matter of law, the trial court's reasons are substantial and compelling. *McAlpin*, 108 Wn.2d at 463; *Nordby*, 106 Wn.2d at 518. The legal sufficiency of an exceptional sentence is reviewed *de novo*. *Pappas*, 176 Wn.2d at 192 (citing *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001)).

i. There is insufficient evidence that Ms. Chavez knew of Mr. Mingus's vulnerability.

For a victim's vulnerability to justify an exceptional sentence, the defendant must know of the particular vulnerability, and the vulnerability must be a substantial factor in the accomplishment of the crime. *State v. Jones*, 59 Wn. App. 744, 753, 801 P.2d 263 (1990) (citing *State v. Handley*, 115 Wn.2d 275, 284–85, 796 P.2d 1266 (1990)); *State v. Gordon*, 153 Wn. App. 516, 223 P.3d 519 (2009). When analyzing particular vulnerability, the focus is on the victim: Was the victim more vulnerable to the offense than other victims and did the defendant know, or should she have known, of that vulnerability? *State v. Vermillion*, 66

Wn. App. 332, 349, 832 P.2d 95, 104 (1992), review denied, 120 Wn.2d 1030, 847 P.2d 481 (1993); *see also State v. Ross*, 71 Wn. App. 556, 861 P.2d 473 (1993), review denied 123 Wn.2d 1019, 875 P.2d 636; *State v. Nguyen* 68 Wn. App. 906, 847 P.2d 936 (1993), review denied, 122 Wn.2d 1008, 859 P.2d 603 (1993).

In the instant case, the evidence presented at trial indicated that Ms. Chavez did not observe Mr. Mingus in the crosswalk before her vehicle hit him. There was no evidence provided that she knew or should have known that Mr. Mingus was elderly or infirm. Moreover, the findings of fact do not even indicate that Ms. Chavez knew or should have known that Mr. Mingus was "particularly vulnerable". Given the foregoing, there is insufficient evidence that Ms. Chavez knew or should have known that Mr. Mingus was particularly vulnerable.

ii. There is insufficient evidence that Mr. Mingus was *particularly* vulnerable.

In *State v. Jackmon*, 55 Wn. App. 562, 567, 778 P.2d 1079, 1082 (1989), the court found that a victim who had a broken ankle was not particularly vulnerable to attempted murder since he was shot from behind without warning, therefore there was no indication that an able-bodied person would have been able to escape the attack. *See also State v. Crutchfield*, 53 Wn. App. 916, 923-24, 771 P.2d 746 (1989) (finding that

victim, who had ingested cocaine shortly before she was strangled, was particularly vulnerable was not supported where the record did not contain enough evidence from which to determine whether her cocaine use was a substantial factor in the homicide).

Likewise, in the instant case, there was no evidence presented that would indicate that an able-bodied person in the same position would not have succumbed to injuries the same way that Mr. Mingus did. The head trauma sustained seems likely to have resulted in death regardless of whoever may be present in the crosswalk. *See* CP 64. As the defense argued in closing, even if Mr. Mingus was an Olympic athlete, there is no evidence to indicate that he would have fared differently than if he was infirm. Mr. Mingus was not *particularly* vulnerable as anyone in the same position would have been just as vulnerable.

Given the above, the trial court's imposition of an exceptional sentence is not supported by the record and was clearly erroneous due to insufficient evidence that Ms. Chavez knew of Mr. Mingus's vulnerability and/or that Mr. Mingus was *particularly* vulnerable. Accordingly, in either event, Ms. Chavez's exceptional sentence must be reversed and her case remanded back to Superior Court for resentencing.

3. No appellate costs are warranted in the event that Ms. Chavez does not substantially prevail.

In the event that Ms. Chavez does not prevail in her appeal, she asks that no costs of appeal be authorized under RAP 14. *See State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Ms. Chavez was indigent and entitled to court-appointed counsel at trial and on appeal.

D. CONCLUSION

Given the foregoing, Ms. Chavez respectfully requests this court to reverse her conviction and remand for entry of an order of dismissal due to the constitutionally deficient charging document. In the alternative, Ms. Chavez respectfully requests that this court reverse her exceptional sentence and remand for resentencing.

DATED this 21st day of August, 2017.

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Asotin County Prosecuting Attorney, Ben Nichols, a true and correct copy of the document to which this certification is affixed, on August 21, 2017 to email address bnichols@co.asotin.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Tana Jo Chavez, a true and correct copy of the document to which this certification is affixed on August 21, 2017 via first class mail postage prepaid to Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

GRECCO DOWNS, PLLC

August 21, 2017 - 11:41 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Tana Jo Chavez
Superior Court Case Number:	16-1-00141-8

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